LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 10 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 444

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BEVERLY W. PATTISHALL,
3500 Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Petitioner.

WOODSON, PATTISHALL & GARNER,
W. THOMAS HOFSTETTER,
ROBERT M. NEWBURY,
Chicago, Illinois,
JOHN T. TABOR,
St. Louis, Missouri,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

		PAGE
I.	Citations to Opinions Below	2
II.	Jurisdiction	2
III.	Questions Presented	2
IV.	Statutes Involved	3
V.	Statement	3
VI.	Reasons for Granting the Writ	4
	A. The Decision Below Sanctioned the Denial of a Fair Trial by Affirming, Without Comment, the Trial Court's Arbitrary, Erroneous and Repeated Refusal to Receive Petitioner's Evidence Essential to Its Proofs	4
	B. The Decision Below Sanctioned the Denial of a Fair Trial by Affirming, Without Comment, the Trial Court's Arbitrary, Erroneous and Repeated Refusal to Inform Petitioner of the Reasons or Gounds for Sustaining Objections to Petitioner's Evidence Essential to Its Proofs	8
VII.	Conclusion	11
Appendix A		13
Appendix B		14
Appendix C		16

Table of Cases.

Adelmann v. Elk River Lumber Co., 242 Minn. 388, 65 N. W. 2d 661 (1954) 10

Coca-Cola Co. v. Chero-Cola Co., 273 Fed. 755 (D. C. Cir. 1921) 7

Colburn v. Chicago, St. P., M. & O. Ry. Co., 109 Wis. 377, 85 N. W. 354 (1901) 10

F. W. Fitch Co. v. Camille, Inc., 106 F. 2d 635 (8th Cir. 1939) 7

Gibson v. Lockheed Aircraft Serv., Inc., 350 U. S. 356 (1956) 5

Griffin v. U. S., 336 U. S. 704 (1949) 4, 10

Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F. 2d 761 (2d Cir. 1960) 7

Hemmeter Cigar Co. v. Congress Cigar Co., 118 F. 2d 64 (6th Cir. 1941) 7

Little Tavern Shops, Inc. v. Davis, 116 F. 2d 903 (4th Cir. 1941) 7

Marshall v. U. S., 360 U. S. 310 (1959) 5

McNabb v. U. S., 318 U. S. 332 (1943) 5

National Van Lines v. Dean, 237 F. 2d 688 (9th Cir. 1956) 7

Perfectform Corp. v. Perfect Brassiere Co., 256 F. 2d 736 (3rd Cir. 1958) 7

Pure Foods, Inc. v. Minute Maid Corp., 214 F. 2d 792 (5th Cir. 1954) 7

Simmons Co. v. Baker, 200 F. Supp. 149 (D. Mass. 1961), aff'd 307 F. 2d 458 (1st Cir. 1962) 7

Square D Co. v. Sorenson, 224 F. 2d 61 (7th Cir. 1955) 7

Standard Oil Co. v. Standard Oil Co., 252 F. 2d 65 (10th Cir. 1958) 7, 15

Thiel v. Southern Pac. Co., 328 U. S. 217 (1946) 5

STATUTES.

15 U. S. C. 1071 3
15 U. S. C. 1114(1) 3, 6, 7, 13
15 U. S. C. 1121 3
15 U. S. C. 1122 2
28 U. S. C. 1254(1) 2
28 U. S. C. 1338 3
35 U. S. C. 146 3

RULE.

Sup. Ct. Rule 19(1) (b) 2, 3, 4, 8, 13

ARTICLE.

"Manning The Dikes" by Justice Harlan in the 18th Annual Benjamin Cardozo Lecture, October 28, 1958 ..... 8, n. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No.....

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, The Seven-Up Company, plaintiff in the District Court, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on January 8, 1965.

I.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court appears at pages 531a-557a of the Joint Appendix, and is reported at 137 U. S. P. Q. 871. The opinion of the Court of Appeals appears as Appendix B hereto, and is reported at 340 F. 2d 954.

II.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 8, 1965 (App. B., *infra*, p. 14). Rehearing was denied on May 13, 1965 (App. C., *infra*, p. 16). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 15 U. S. C. § 1122.

III.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals has sanctioned so radical a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as provided by Rule 19(1)(b), by affirming, without comment, the trial court's arbitrary, erroneous and repeated refusal to receive petitioner's evidence essential to its proofs.

2. Whether the Court of Appeals has sanctioned so radical a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as provided by Rule 19(1)(b), by affirming, without comment, the trial court's arbitrary, erroneous and repeated refusal to inform petitioner of the reasons or grounds for sustaining objections to petitioner's evidence essential to its proofs.

IV.

STATUTES INVOLVED.

The only statute or rule directly involved in this petition is Supreme Court Rule 19(1)(b). Collaterally involved is Title 15 U. S. C. 1114(1).

V.

STATEMENT.

This is an action for trademark infringement and unfair competition. The jurisdiction of the District Court was invoked because this is an action *de novo* arising from a prior Patent Office proceeding (15 U. S. C. 1071; 35 U. S. C. 146), because this is an action arising under the trademark laws of the United States (15 U. S. C. 1121; 28 U. S. C. 1338), and because of the diversity of citizenship of the parties, the requisite jurisdictional amount being involved.

Petitioner's complaint, after alleging long prior use of the trademark 7 UP for soft drinks, alleges that purchaser confusion and deception results from respondent's use of the trademark GET UP for soft drinks (6a-8a). At the conclusion of the trial, the complaint was dismissed, and that judgment was affirmed by the Court of Appeals in its two paragraph *per curiam* decision.

At the trial, petitioner sought to introduce the testimony of more than one hundred witnesses who had actually purchased GET UP believing it to be put out by the makers of 7 UP (57a-232a). The District Court, however, summarily refused to hear any of such testimony, refused to allow petitioner's counsel to be heard on the subject and failed to state any reason or basis for the rejection (58a). Likewise, when petitioner sought to introduce into evidence copies of respondent's bottling franchise agreement which contain

respondent's own evaluation of the likelihood of confusion resulting from the use by others of the term UP in soft drink trademarks, the trial court refused to admit the exhibits (237a).

Throughout the trial, petitioner's counsel repeatedly inquired of the trial court as to the basis for evidentiary exclusions (425a, 437a, 468a), and petitioner even asked for a recess to inquire into the reasons why evidence was being excluded (58a). Without exception, petitioner's requests were summarily denied.

The foregoing conduct, all urged on appeal by petitioner as grounds for reversal, was sanctioned by the Court of Appeals without comment. Subsequently petitioner sought rehearing solely on the aforementioned evidentiary errors, but the petition was denied without comment (Appendix C).

VI.

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Sanctioned the Denial of a Fair Trial by Affirming, Without Comment, the Trial Court's Arbitrary, Erroneous and Repeated Refusal to Receive Petitioner's Evidence Essential to Its Proofs.

The conduct of the trial judge below, in arbitrarily refusing to hear petitioner's evidence essential to its proofs, "so far departed from the accepted and usual course of judicial proceedings" as to demand that this Court exercise its power of supervision. Rule 19(1)(b). This demand is the more compelling because the Court of Appeals totally failed to comment upon the trial court's wholesale exclusion of evidence. *Griffin* v. *U. S.*, 336 U. S. 704, 707 (1949). Ordinarily, evidentiary errors would not warrant the granting of a writ, but the unrestrained, persistent exclu-

sion of essential admissible evidence in the present case was so "obviously and injuriously erroneous" that, because of the sanction of the Court of Appeals, it peculiarly requires rectification by this Court. *Gibson* v. *Lockheed Aircraft Serv., Inc.*, 350 U. S. 356, 357 (1956).

Petitioner submits that a writ of certiorari should be granted here, not only to correct the gross error committed below, but also, in the exercise of this Court's supervisory power, to formulate and apply proper standards for the federal courts in the conduct of trials. *McNabb* v. *U. S.*, 318 U. S. 332, 341 (1943); *Marshall* v. *U. S.*, 360 U. S. 310, 312 (1959). The *per curiam* decision below has sanctioned grievous evidentiary errors that violated fundamental principles of justice and that completely denied petitioner a fair trial. In the *McNabb* case, this Court stated, at page 341:

> "In the exercise of its supervisory authority over the administration of criminal justice in the federal courts (citing case), this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. (Citing cases.) And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

The *McNabb* rule is not limited to criminal justice and has been applied in the exercise of this Court's supervisory authority over the administration of civil justice in the federal courts. *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217, 225 (1946).

To understand the extraordinary nature and extent of the trial court's evidentiary errors requires only a cursory knowledge of the case. This action being for trademark infringement and unfair competition, the issue is whether use of the accused mark is likely to cause confusion as to

source (15 U. S. C. 1114(1)). To prove that such confusion is likely, petitioner offered the testimony of over one hundred witnesses who had actually purchased respondent's GET UP soft drink under the mistaken belief that they were buying a product put out by the makers of 7 UP. The trial court, however, arbitrarily refused to permit any consumer witness to testify as to his or her own actual confusion in the market place[1] and refused to permit petitioner's counsel to be heard respecting the universally accepted admissibility of such evidence. Set forth below is the trial judge's ruling on the first consumer witness called by petitioner, which ruling was repeated by the trial judge more than one hundred times (58a).

> "Q. When you purchased GET UP did you have any belief as to what company put it out?
>
> Mr. Howes: I object, your Honor.
>
> The Court: Sustained.
>
> A. I believe it was put up—
>
> The Court: That will be stricken.
>
> Mr. Pattishall: May I be heard on that, your Honor?
>
> The Court: No, sir.
>
> Mr. Pattishall: Your Honor, this is—
>
> The Court: I said no, sir. Put another question if you have one."

After thus being precluded from introducing its evidence, petitioner made the following offer of proof (58a):

> "That if the witness had been permitted to answer

---

1. 58a, 59a, 60a, 61a, 62a, 63a, 64a, 67a, 68a, 70a, 73a, 74a, 76a, 77a, 78a, 79a, 80a, 81a, 82a, 84a, 85a, 87a, 88a, 89a, 90a, 93a, 96a, 97a, 99a, 100a, 102a, 104a, 106a, 107a, 108a, 109a, 111a, 112a, 113a, 114a, 115a, 117a, 118a, 119a, 120a, 121a, 122a, 124a, 125a, 126a, 128a, 129a, 131a, 132a, 133a, 135a, 136a, 137a, 139a, 141a, 142a, 143a, 144a, 146a, 147a, 148a, 149a, 150a, 151a, 152a, 153a, 154a, 155a, 156a, 157a, 158a, 159a, 160a, 161a, 163a, 164a, 165a, 167a, 168a, 169a, 170a, 171a, 172a, 173a, 174a, 176a, 177a, 178a, 179a, 180a, 182a, 183a, 184a, 185a, 186a, 187a, 188a, 189a, 190a, 230a-232a.

> the question put she would have testified that when she purchased GET UP she was under the belief that it was put out by the Plaintiff, The Seven-Up Company, because of the brand 'GET UP' and she remained under that belief until recently when it was explained to her that the product did not come from Seven-Up."

Similar evidence of confusion is held by every federal circuit to be proof of the statutory (15 U. S. C. 1114(1)) and common law evidentiary issue in trademark cases. *Standard Oil Co.* v. *Standard Oil Co.*, 252 F. 2d 65, 74 (10th Cir. 1958); *National Van Lines* v. *Dean*, 237 F. 2d 688, 692 (9th Cir. 1956); *F. W. Fitch Co.* v. *Camille, Inc.*, 106 F. 2d 635, 640 (8th Cir. 1939); *Square D Co.* v. *Sorenson*, 224 F. 2d 61, 64 (7th Cir. 1955); *Hemmeter Cigar Co.* v. *Congress Cigar Co.*, 118 F. 2d 64, 70 (6th Cir. 1941); *Pure Foods, Inc.* v. *Minute Maid Corp.*, 214 F. 2d 792, 797 (5th Cir. 1954); *Little Tavern Shops, Inc.* v. *Davis*, 116 F. 2d 903, 905, 906 (4th Cir. 1941); *Perfectform Corp.* v. *Perfect Brassiere Co.*, 256 F. 2d 736, 740 (3rd Cir. 1958); *Harold F. Ritchie, Inc.* v. *Chesebrough-Pond's, Inc.*, 281 F. 2d 755, 761 (2d Cir. 1960); *Simmons Co.* v. *Baker*, 200 F. Supp. 149, 152 (D. Mass. 1961), *aff'd* 307 F. 2d 458 (1st Cir. 1962); *Coca-Cola Co.* v. *Chero-Cola Co.*, 273 Fed. 755, 756 (D.C. Cir. 1921).

Likewise, the District Court arbitrarily refused to admit respondent's own evaluation of likelihood of confusion which was contained in respondent's franchise agreements (Plf's Exh. 8 for id; 558a). These agreements provide:

> "The Bottler will not bottle, distribute or sell, directly or indirectly, any other beverage with the name 'UP' and/or any beverage which could be confused with Get Up."

In spite of the inarguable materiality of such a statement by respondent, the trial court not only excluded the

exhibits, but also summarily interrupted and stopped petitioner's efforts to explain their materiality (237a).

That it is not within the trial court's discretion to reject admissible evidence is beyond dispute. Yet the Court of Appeals, without comment, sanctioned the trial court's totally erroneous evidentiary exclusions. Petitioner has thus been precluded from proving its crucial allegations of actual confusion and has repeatedly been denied any explanation for so radical a departure "from the accepted and usual course of judicial proceedings." Rule 19(1)(b). That petitioner should not be denied a fair trial or a fair and full day in court, and that such denial should not be sanctioned by the Court of Appeals are, *a fortiori*, matters "'of general importance,'"[2] deserving review by this Court.

B. The Decision Below Sanctioned the Denial of a Fair Trial by Affirming, Without Comment, the Trial Court's Arbitrary, Erroneous and Repeated Refusal to Inform Petitioner of the Reasons or Grounds for Sustaining Objections to Petitioner's Evidence Essential to Its Proofs.

In a trial that involved less than three hundred questions by petitioner's counsel (excluding merely preliminary matter), the District Court sustained, without stating any ground whatever, objections to approximately one hundred questions. As previously shown, all of petitioner's evidence of actual confusion was rejected without any basis being stated, and petitioner's requests to be heard were summarily refused (30a, 58a, 192a, 247a, 249a-250a, 334a, 387a, 400a, 485a-486a). Whenever petitioner asked for the grounds for

---

2. "Manning The Dikes" Mr. Justice Harlan, 18th Annual Benjamin Cardozo Lecture, October 28, 1958. Record, Assoc. of the Bar of the City of New York. Vol. 13:541 at p. 551.

evidentiary exclusions, the trial judge refused to inform petitioner, often saying that there was "no need" for petitioner to know why its evidence was being excluded. The following record excerpts show the arbitrary conduct of the trial judge in rejecting petitioner's repeated attempts to learn why its evidence was being excluded:

> "Mr. Cohen: Objection.
> The Court: Sustained.
> Mr. Pattishall: May I inquire what the grounds are, your Honor?
> The Court: No need." (425a.)

> "Mr. Howes: I object.
> A. Yes.
> The Court: Sustained.
> Mr. Pattishall: That seems like a proper question to me, your Honor. May I inquire what's wrong with that?
> The Court: A lot of things. There is no need to explain. You understand your lawsuit better than I do." (437a.)

> "Mr. Collison: Objection.
> The Court: Sustained.
> Mr. Pattishall: May I inquire what the grounds for the objection to that last question were?
> The Court: Because it was improper.
> Mr. Pattishall: Sir?
> The Court: Because it was improper.
> Mr. Pattishall: May I ask in what respect?
> The Court: You should know. A man of your experience isn't that ignorant of the Rules of Evidence." (468a.)

When grounds for sustaining objections are stated, the objections may be cured. When the trial judge refuses to state grounds, the process of trial is correspondingly refused. Although this Court has not yet dealt directly with this problem, it has been held by state Supreme Courts that,

when a party inquires of a trial court the ground for sustaining an objection, "it is the court's duty to answer that inquiry" *Adelmann* v. *Elk River Lumber Co.*, 242 Minn. 388, 394, 65 N. W. 2d 661, 666 (1954); *Colburn* v. *Chicago, St. P., M. & O. Ry. Co.*, 109 Wis. 377, 85 N. W. 354 (1901). This Court should articulate a similar rule requiring the federal trial judges to state the grounds for evidentiary rulings when the litigants are in doubt and inquire as to the basis of a ruling. Such a rule would provide a record to review evidentiary rulings on appeal. The need for such a record is shown by the fact that here, after the trial judge's refusal to inform petitioner of the reason for exclusion of its evidence and the Court of Appeal's lack of comment, petitioner is still totally uninformed as to why its evidence was rejected. Since petitioner even yet does not know why its evidence was excluded, petitioner is unable to argue fully as to the impropriety of the exclusion rulings. In *Griffin* v. *U. S.*, 336 U. S. 704 (1949), at page 707, this Court commented on the failure of a Court of Appeals to state the basis of its ruling:

> "Unfortunately, the Court of Appeals evidently thought that the ground for dismissing the appeal was too clear to require explication. It dismissed the appeal without an expression of views regarding the admissibility of the evidence on which the claim for a new trial rests. * * * It seems to us more appropriate for the Court of Appeals to address itself directly to the issue of admissibility."

Petitioner submits that so gross has been the failure of the judicial process that a matter "of general importance" deserving review by this Court is presented. Petitioner has raised in its appeal and reiterated in its Petition for Rehearing that it was denied a fair trial. Petitioner requested remand for another trial before another judge, but was denied its requests without comment or explana-

tion by the Court of Appeals in the face of a record disclosing repeated refusal by the trial judge to receive inarguably admissible evidence on basic contested issues, and moreover, repeated refusal even to state its grounds for excluding such evidence.

VII.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BEVERLY W. PATTISHALL,
3500 Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Petitioner.

WOODSON, PATTISHALL & GARNER,
W. THOMAS HOFSTETTER,
ROBERT M. NEWBURY,
Chicago, Illinois,
JOHN T. TABOR,
St. Louis, Missouri,
Of Counsel.

APPENDIX A.

Supreme Court Rule 19(1)(b).

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * * *

(b) Where a court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Title 15 U. S. C. § 1114(1)

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive shall be liable in a civil action by the registrant for the remedies hereinafter provided.

APPENDIX B.

No. 15630

UNITED STATES COURT OF APPEALS.

For the Sixth Circuit.

THE SEVEN-UP COMPANY, *Plaintiff-Appellant,* *vs.* THE GET UP CORPORATION, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided January 8, 1965.

Before EDWARDS, *Circuit Judge,* PRETTYMAN, *Senior Circuit Judge,** and BOYD, *District Judge.***

PER CURIAM. The Seven-Up Company, our appellant, sued The Get Up Corporation for infringement of its trademark and for unfair competition. The action was tried by the District Court without a jury. That court heard extensive evidence, made findings of fact, reached conclusions of law, rendered an opinion, and dismissed the complaint. The opinion was emphatic and in parts phrased colloquially, but it was clear in its holdings. We find in it no error affecting substantial rights of the appellant-plaintiff.

* Sitting by designation from the District of Columbia Circuit.

** Sitting by designation from the Western District of Tennessee.

Appellant urges that the trial court applied to the problem a test of likelihood of confusion of goods whereas the proper test is of likelihood of confusion as to source. Quite apart from the vague niceties of the distinction, it is quite clear that the court, in ruling upon the case, considered and passed upon the contention as made by the plaintiff. Thus, in stating the issues the court said: "Plaintiff further says that Defendant by such confusion of source of purchase is misappropriating Plaintiff's business. . . ." The court quoted from and relied upon the opinion of the Tenth Circuit in *The Standard Oil Company* v. *Standard Oil Company,* 252 F. 2d 65 (1958). The trial court phrased the test of that case as follows: "So a proper test relates to producing in the minds of ordinary purchasers, exercising due care in the market place, confusion as to origin of goods." It seems clear to us that the District Court did not, as our appellant urges, apply ar erroneous test.

AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS.
For the Sixth Circuit.

THE SEVEN-UP COMPANY,
Plaintiff-Appellant,
vs.
THE GET UP CORPORATION,
Defendant-Appellee.

No. 15,630

ORDER.

(Filed May 13, 1965, Carl W. Reuss, Clerk.)

Before EDWARDS, *Circuit Judge,* PRETTYMAN, *Senior Circuit Judge,* and BOYD, *District Judge.*

Appellant's petition for rehearing having been received and considered, said petition is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 444

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WALTER J. HALLIDAY,
60 East 42nd Street,
New York, New York 10017,
Counsel for Respondent.

Of Counsel:
OLIVER P. HOWES, JR.,
BERT A. COLLISON,
M. L. SEVERN,
New York, New York.

AVERY S. COHEN,
Cleveland, Ohio.

TABLE OF CONTENTS

	PAGE
I. Counter-Statement of the Case	1
II. Reasons Why Certiorari Should Be Denied	5
A. The Statement by the Court of Appeals That the Opinion Below was Clear in Its Holdings, and That It Found No Error Affecting Substantial Rights of Petitioner, is Sufficient Comment on the Rulings of the Trial Court and the Petition Shows No Reason for Further Review of the Trial Proceedings by This Court	5
1. Contrary to Petitioner's Contention, the District Court Made No Holding That Evidence of Consumer Confusion Properly Presented Under the Rules of Evidence Would Not Be Admissible	5
2. Petitioner's Claim That It Was Denied a Fair Trial Because It Was Not Advised of the Basis for Evidentiary Rulings is Without Substance	7
B. The Questions Posed by Petitioner Are Abstract and Cannot Affect the Outcome of the Litigation Because the Decision Turned, Not on the Issue Upon Which Petitioner Seeks Certiorari, But Upon Undisputed Conclusions Which, Independently, Required That the Dismissal of the Complaint Be Affirmed	9
1. The Uncontroverted Conclusion of the District Court Being That Use of the Word "Up" is Free and Equal to All, the Excluded Evidence, Had It Been Ad-	

PAGE

mitted, Would Not Have Affected the Judgment of Dismissal 10

2. No Substantial Right of Petitioner Was Affected by the Holdings of the District Court Since Petitioner is Barred by Laches and Estopped by Acquiescence From Asserting Any Claim Against Respondent 11

Conclusion 12

Table of Cases

Coca-Cola v. Carlisle Bottling Works, 43 F. 2d 119 (C.C.A. 6, 1930) 10

Dixi-Cola Laboratories v. Coca-Cola Co., 117 F. 2d 352 (C.C.A. 4, 1941) 11

French Republic v. Saratoga Vichy Co., 191 U. S. 427 (1903) 12

Gibson v. Lockheed Aircraft Service, Inc., 350 U. S. 356 (1956) 9

Griffin v. U. S., 336 U. S. 704 (1949) 9

Marshall v. U. S., 360 U. S. 310 (1959) 9

McNabb v. U. S., 318 U. S. 332 (1943) 9

The Monrosa v. Carbon Black, Inc., 359 U. S. 180 (1959) 10

Peckham v. Family Loan Co., 262 F. 2d 422 (C. A. 5, 1959) 8

Saxlehner v. Eisner, 179 U. S. 19 (1900) 12

Saxlehner v. Wagner, 216 U. S. 375 (1910) 12

PAGE

The Standard Oil Company v. Standard Oil Company, 252 F. 2d 65 (C. A. 10, 1958) 7

Thiel v. Southern Pacific Co., 328 U. S. 217 (1946) 9

Statutes

15 U. S. C. 1071 2

35 U. S. C. 146 2

Treatise

II Wigmore on Evidence (3rd Ed.), § 654, p. 758 6

Abbreviation

In this brief the following abbreviation is used:

Pet.	For Petition for Writ of Certiorari followed by the number of a page referred to.

Typography

Petitioner's trademark as shown in its registrations appears both in the word form "SEVEN UP" and a form consisting of the numeral "7" followed by the word "up". Since the numeral form is the form in which it appears in most of petitioner's registrations and is the form in which it is used most prominently on petitioner's bottles and labels and in its advertising, we shall use that form in this brief when referring to petitioner's mark. As registered and used it consists of a large numeral "7" followed by "up" in lower case letters considerably smaller than the numeral. Therefore in this brief, generally, it will be printed thus—7up.

IN THE

Supreme Court of the United States

October Term, 1965

No. 444

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, The Get Up Corporation, defendant in the District Court, appellee below, prays that this Court not issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on January 8, 1965.

I

COUNTER-STATEMENT OF THE CASE

Petitioner incorrectly contends that "only a cursory knowledge of the case" (Pet. 5) is required, and its statement, made accordingly, is insufficient.

Petitioner brought this action in the United States District Court under 15 U. S. C. 1071 and 35 U. S. C. 146 to review certain proceedings between the parties herein in the United States Patent Office, such proceedings having been determined adversely to petitioner, and to enjoin use of respondent's trademark GET UP.

The Patent Office proceedings were brought by petitioner to cancel registrations of respondent's trademark, which had been issued in 1935 and again in 1955, Cancellation Nos. 6528 and 6620, and, also, an opposition by petitioner to an application by respondent for an additional registration of its mark, Opposition No. 35,103. All three proceedings were dismissed by the Trademark Trial and Appeal Board of the Patent Office (520a-525a).

The District Court tried the case without a jury and dismissed the complaint. The Court of Appeals affirmed the dismissal of the complaint and commented that the District Court "heard extensive evidence, made findings of fact, reached conclusions of law, rendered an opinion and dismissed the complaint." A petition to the Court of Appeals for rehearing was denied.[1]

Three separate grounds for dismissal are stated in the District Court's opinion. These are:

First, the Court held that there was no likelihood of confusion between respondent's trademark GET UP and petitioner's trademark **7up** (also SEVEN-UP), as applied to soft drinks (Conclusion 2, 660a). In reaching this conclusion, the District Court stated it applied a test which, as quoted with approval by the Court of Appeals, "relates to producing in the minds of ordinary purchasers, exercising due care in the market place, confusion as to the origin of goods" (547a, Pet. 15). The District Court's application of this approved test was a reason for the Court's ruling

[1] The order of the Court of Appeals appears as Appendix C to the Petition.

that the results of a survey which was submitted by petitioner as showing likelihood of confusion, and which was received in evidence, had no probative value (Finding 36, 657a).[2] No question as to the propriety of such holding is raised by the petition. Application of such test led to the Trial Court's rejection of 100 or more depositions, offered by petitioner, and to refusal to permit 14 witnesses produced in court to answer a question for which no adequate foundation had been laid and which the Court held to be improper.

This evidentiary ruling, which is the *sine qua non* upon which this petition is based, is explained in the opinion of the District Court, thus (552a):

> "In the 100 to 120 depositions which were herein mentioned, the following question was put:
>
> 'Q. When you purchased Get Up, did you have any belief as to what company put it out?' Which is practically the same question as appears in the survey. This third question in these 100 to 120 depositions was considered objectionable by the Court, and answers not permitted as to three witnesses here produced, as to nine on the verge of production as to the 100 to 120 depositions itself because the Court considered the question unfair, misleading and improper; just as much so as question number 3 in the survey."
>
> • • •
>
> "Had all such answers been given as have been called for in all these depositions, and by all these witnesses, as proffered, they would have been entitled to no weight because the questions were improper, and contrary to law."

Thus the District Court found that there was no evidence that defendant had caused confusion or deception of purchasers, and that the trademarks **7up** (or SEVEN-UP) and

---

[2] The findings printed at 651a-659a entitled "Defendant's Proposed Findings of Fact" are the findings of the Court. See 663a.

GET UP, used on similar products, are not likely to cause confusion, deception or mistake because they are not similar in sound, appearance or significance (Findings 42-44, 657a-658a).

As a second ground for its dismissal of the complaint, the District Court, finding no credible evidence that there is any similarity between **7up** (also SEVEN-UP) and GET UP except for the word "up" (Finding 38, 657a), and that "up" is a descriptive word with respect to beverages which over the past 50 years has been used in many beverage trademarks (Findings 19-21, 653a-654a), held that the use of the word "up" gave rise to no rights in petitioner against respondent, because petitioner "does not own exclusive right to the use of the word 'up', the use of the word 'up' being free and equal to all" (Conclusion 6, 660a).

The opinion and findings of the District Court list 38 different beverage trademarks of different concerns, all registered in the Patent Office (542a; 654a), and make special note of PIKMEUP, registered in 1907, "over 20 years before any business in **7up** also SEVEN-UP) began", and BUBBLE UP, registered in 1921, which was several years prior to the first use and registration of petitioner's trademark (Findings 21 and 22, 654a).

Finally, as a third ground for dismissing the complaint, the Court affirmed the decision of the Trademark Trial and Appeal Board with respect to petitioner's laches and acquiescence, saying, in the conclusion of the opinion:

> "We find Plaintiff has here proved no case. Had it really had any proper complaint of Defendant's activities, had it proved any case, we find the special defense of laches would have applied. We agree with the Patent Office, that waiting over 20 years to complain * * * constituted laches.
>
> "Defendant's second defense of estoppel is also well taken, in which we also agree with the Patent Office." (556a-557a)

In affirming the judgment, the Court of Appeals referred to the opinion of the District Court as "clear in its holdings" and declared that it found "no error affecting substantial rights" of petitioner.

II

REASONS WHY CERTIORARI SHOULD BE DENIED

A. The Statement by the Court of Appeals That the Opinion Below was Clear in Its Holdings, and That It Found No Error Affecting Substantial Rights of Petitioner, is Sufficient Comment on the Rulings of the Trial Court and the Petition Shows No Reason for Further Review of the Trial Proceedings by This Court.

1. *Contrary to Petitioner's Contention, the District Court Made No Holding That Evidence of Consumer Confusion Properly Presented Under the Rules of Evidence Would Not Be Admissible.*

Petitioner's charge that the District Court by "wholesale exclusion of evidence" so far departed from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's power of supervision is based largely upon a wholly unfounded contention that the District Court held evidence of consumer confusion to be inadmissible in trademark cases.

The District Court made no such ruling. Indeed, no occasion ever arose for such a ruling as no such evidence was ever properly placed before the Trial Court. Therefore, petitioner's long list of authorities for the undisputed proposition that evidence of confusion is relevant to the issues raised in trademark cases is wholly irrelevant here. It does not appear from the decisions in the cited cases that evidence of confusion was presented without the necessary foundation. Here, petitioner failed to establish the proper foundation for its evidence.

Thus, for example, the first of these witnesses, after being identified by name, address and occupation, was asked whether and where she or her family had purchased GET UP, and then, without more, was asked to state whether when she purchased it she had had "any belief as to what company put it out" (58a).

This formula was followed without material variation in the examination of all the witnesses in this category, both at the trial (57a-61a) and on depositions (63a-190a). None of these persons were asked the customary questions calculated to identify such witnesses in relation to the matter on which they were called to testify, or to show how they were selected, came to be called, or the group from which they were picked. Since petitioner made no attempt to show in what manner the witness had come to its attention, or how the witness acted at the time of making purchases the Trial Court was placed by petitioner in the position of having to guess whether petitioner's witnesses were competent.

Wigmore, in discussing the burden of proof, explains the importance of laying such a foundation:

> "* * * since the probabilities are all against a particular person, out of all persons, having been one to observe the particular matter in hand, it cannot be assumed that he is one of the few admissible persons, and his qualifications as to observation, or knowledge, must be made to appear beforehand. Such is the generally accepted rule.
>
> Hence, the witness, before he refers to the matter in hand, *must make it appear that he had the requisite opportunities to obtain correct impressions* on the subject; and the first questions put to him should be and usually are, directed to laying this foundation." *II Wigmore on Evidence* (3rd Ed.), § 654, p. 758.

The lack of an adequate foundation for the question, "When you purchased GET UP did you have any belief as to what company put it out?" was of concern to the Trial Court, particularly for the reason that this made it

impossible to judge the degree of care exercised by the witness who was asked the question, in making the purchase to which the question referred (552a). Without this, no answer that any of these witnesses might have made could be material evidence. The witnesses in answering the question would have been testifying in a vacuum. For this reason alone, the objections to the question were properly sustained.

Petitioner's statement of the case does not include any reference to petitioner's survey, *supra,* page 3, and petitioner does not complain to this Court about the District Court's refusal to accord to the survey any probative value, or about the decision of the Court of Appeals in affirming this ruling. However, the application of the same rule of evidence to the 100 or more depositions, resulting in their rejection, and to the proffered testimony of petitioner's witnesses has been made the basis on which this Court is asked to grant certiorari.

Certainly, this ruling was consistent with the test for establishing likelihood of confusion as phrased by the Trial Court, approved herein by the Court of Appeals, and previously stated by the Court of Appeals for the Tenth Circuit in *The Standard Oil Company* v. *Standard Oil Company,* 252 F. 2d 65 (1958).

2. *Petitioner's Claim That It Was Denied a Fair Trial Because It Was Not Advised of the Basis for Evidentiary Rulings is Without Substance.*

Petitioner's statement (Pet. 8-9) that "Whenever petitioner asked for the grounds for evidentiary exclusions, the trial judge refused to inform petitioner." is not correct. In the course of the direct examination by petitioner, the Trial Court again and again did state its reasons for sustaining objections (30a, 192a, 249a, 250a, 251a, 253a, 254a, 299a, 326a-327a, 436a).

Throughout the trial the Court gave consideration to the fact that the evidence was being submitted by counsel

who are specialists in the field. In sustaining an objection to the testimony of petitioner's expert witness, the Court remarked,

> "You know his purpose isn't competent. I think even he knows that. So put another question." (254a)

The Court made it plain that it was not going to waste time in explaining what, in its opinion, should not have to be explained, or to permit interruptions of the trial by unnecessary arguments on obviously objectionable questions. This is best illustrated by the three excerpts from the Trial Court's rulings selected by petitioner to show an arbitrary attitude on the part of the Court (Pet. 9). However, reading a short portion of the record leading up to the objections shows that these rulings relate to three different but classically objectionable questions of petitioner. Obviously, there was no need to explain the rulings on such questions.

This approach was quite within the Court's discretion in the conduct of the trial. The judge presiding at a trial is "not only empowered to keep a case moving within the bounds of reason but it is his duty to do so". *Peckham* v. *Family Loan Co.*, 262 F. 2d 422, 425 (C. A. 5, 1959).

Furthermore, in none of the instances cited by petitioner to show that the Court refused to explain its rulings (Pet. 8) was an actual request for such an explanation made. What petitioner requested of the Court in each instance was not an explanation of the Court's ruling but an opportunity to argue the question, the implication being that the petitioner knew the ground of the ruling. In fact, in several of these instances the request for permission to argue follows the Court's explanation of its ruling. For example, in sustaining an objection to a question (247a) the Court said, "The form is bad", only to have the petitioner repeat the error until the Court, refusing counsel's requests to be heard, finally said, "You know how to put a proper question, put one" (248a).

Petitioner's citation of *Griffin* v. *U. S.*, 336 U. S. 704, 707 (1949) in this connection is inappropriate because in that case this Court clearly indicated that it was because of the circumstances, namely, a death sentence, that the grounds of the dismissal of the appeal ought not to have been left to inference. It should be noted that petitioner's other authorities are similarly inappropriate.[3]

Petitioner's contention (Pet. 9) that it was injured by not being informed of the grounds for sustaining objections, on the theory that if the rulings had been explained the objections might have been cured, has little merit. In all but fourteen instances the testimony of the "more than one hundred witnesses" involved was produced in the form of depositions which could not have been cured and transformed into acceptable testimony.

B. The Questions Posed by Petitioner Are Abstract and Cannot Affect the Outcome of the Litigation Because the Decision Turned, Not on the Issue Upon Which Petitioner Seeks Certiorari, But Upon Undisputed Conclusions Which, Independently, Required That the Dismissal of the Complaint be Affirmed.

The granting of a writ for the narrow reasons claimed by petitioner would not affect the judgment of dismissal. The evidentiary issue discussed in the petition applies only to claimed evidence of confusion. In no way does it apply to the uncontroverted findings and conclusions with respect to the common use and descriptive meaning of the word "up", nor does it apply to the issues of laches

---

[3] *McNabb* v. *U. S.*, 318 U. S. 332 (1943) and *Marshall* v. *U. S.*, 360 U. S. 310 (1959) cited by petitioner as authority for this Court to exercise its supervisory power are concerned with judicial supervision over criminal justice. The only civil case in which the *McNabb* case has been cited by this Court is *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946) which has only been relied upon by this Court as authority for the proposition that a jury must be fairly impaneled. *Gibson* v. *Lockheed Aircraft Service, Inc.*, 350 U. S. 356 (1956) was a personal injury action and was appealed from the Trial Court's refusal to grant certain of defendant's instructions to the jury.

and estoppel. Even if the questions which petitioner asks this Court to decide in its favor had the significance which petitioner claims for them, certiorari would not be warranted because the answers to such questions would not be given in the context of meaningful litigation. *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180 (1959). Thus the granting of certiorari would be no more than an academic exercise.

1. *The Uncontroverted Conclusion of the District Court Being That Use of the Word "Up" is Free and Equal to All, the Excluded Evidence, Had It Been Admitted, Would Not Have Affected the Judgment of Dismissal.*

The Court found "no credible evidence that there is any similarity between plaintiff's trademark **7up** (also SEVEN-UP) and defendant's trademark GET UP except for the use of the word 'up' " (Finding 38, 657a). Furthermore it was found that the word "up" is descriptive with respect to beverages (Finding 19, 653a) and has been and still is in common use in beverage trademarks (*supra*, p. 4). The Court then came to the following conclusion:

> "The use of the word 'up' which appears on the products of both parties gives rise to no rights whatsoever of plaintiff against defendant because plaintiff does not own exclusive right to the use of the word 'up', the use of the word 'up' being free and equal to all." (Conclusion 6, 660a)

This uncontroverted conclusion and the findings upon which it is based fully support the statement of the Trial Court that had all the answers in all the depositions and by all the witnesses been permitted, as proffered, they would have been entitled to no weight (552a and Finding 37, 657a). This is so because it is a well recognized rule of law that trademark infringement is not established merely by use of the same descriptive term as a component part of two competitors' trademarks. *Coca-Cola* v. *Carlisle Bottling Works*, 43 F. 2d 119 (C.C.A. 6, 1930); *Dixi-Cola*

Laboratories v. *Coca-Cola Co.*, 117 F. 2d 352 (C.C.A. 4, 1941).

For the same reason, the franchise agreements about whose exclusion petitioner complains (Pet. 7-8) would have had no affect on the judgment of dismissal even if their ambiguity had been resolved in accordance with petitioner's interpretation.

2. *No Substantial Right of Petitioner Was Affected by the Holdings of the District Court Since Petitioner is Barred by Laches and Estopped by Acquiescence From Asserting Any Claim Against Respondent.*

The fact that petitioner raises solely an evidentiary issue with respect to attempted proof of confusion does not alter the fact that the District Court held that even if petitioner had proved a case of infringement, which it did not, it was barred by laches and estopped by acquiescence from asserting any claim against respondent for use of the trademark GET UP (Conclusions 8 and 9, 660a). The Court of Appeals affirmed the judgment.

The District Court was the second tribunal, the first being the Patent Office, to decide that petitioner's failure to protest or assert its claimed rights against respondent for over 25 years constituted laches which barred it from any relief, even if it had proved a case, and that it was also estopped by its acquiescence from complaining of respondent's use of the trademark GET UP (525a).

This Court has long held that laches bars injunctive relief in trademark or unfair competition cases where delay in asserting a claim of rights is inexcusable and so prolonged as to make it inequitable to interfere with the respondent's use of its trademark. This rule has particular application where, as here, petitioner claims exclusive rights in a word after having acquiesced in its adverse use by many others.

French Republic v. *Saratoga Vichy Co.*, 191 U. S. 427 (1903);
Saxlehner v. *Eisner*, 179 U. S. 19 (1900);
Saxlehner v. *Wagner*, 216 U. S. 375 (1910).

Clearly, petitioner asks this Court to review evidentiary rulings for possible errors which, even if found to exist, would not affect any substantial right of petitioner, for it is barred by laches and estopped by acquiescence.

Conclusion

The Court of Appeals has not departed from the usual course of judicial proceedings nor has it sanctioned such a departure by the District Court. Petitioner has not shown any reason which calls for the exercise of this Court's powers of supervision. The petition should be denied.

Respectfully submitted,

WALTER J. HALLIDAY,
60 East 42nd Street,
New York, New York 10017,
Counsel for Respondent.

Of Counsel:
OLIVER P. HOWES, JR.,
BERT A. COLLISON,
M. L. SEVERN,
New York, New York.

AVERY S. COHEN,
Cleveland, Ohio.

Office-Supreme Court, U
FILED
SEP 30 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 444

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

BEVERLY W. PATTISHALL,
3500 Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Petitioner.

W. THOMAS HOFSTETTER,
ROBERT M. NEWBURY,
Chicago, Illinois,
JOHN T. TABOR,
St. Louis, Missouri,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

PAGE

I. THE EVIDENCE OF ACTUAL CONFUSION WAS IMPROPERLY EXCLUDED 2

A. There Was an Adequate Foundation for the Testimony of Public Consumers 2

B. The Trial Court Arbitrarily, Erroneously and Repeatedly Refused to Inform Petitioner of the Grounds for Sustaining Virtually Every Objection to the Evidence Essential to Petitioner's Proofs 4

II. THE GRANTING OF THE PETITION WILL RESULT IN NO "ACADEMIC EXERCISE" 8

A. The Word "UP" May Not Be Used as a Distinctive Part of a Trademark If It Deceives the Purchasing Public as to Source 8

B. Whether Laches and Acquiescence Bar Injunctive Relief In This Action Can Only Be Determined After a Fair and Impartial Trial 10

III. CONCLUSION 12

TABLE OF CASES.

A. E. Staley Mfg. Co. v. Staley Milling Co., 253 F. 2d 269 (7th Cir. 1958) 11

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 (1916) 10

McLean v. Fleming, 96 U. S. 245 (1877) 10

Menendez v. Holt, 128 U. S. 514 (1888) 11

San Francisco Ass'n For The Blind v. Industrial Aid For The Blind, 152 F. 2d 532 (8th Cir. 1946) 11

Stork Restaurant v. Sahati, 166 F. 2d 348 (9th Cir. 1948) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 444.

THE SEVEN-UP COMPANY,

Petitioner,

vs.

THE GET UP CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

In its brief in opposition to the petition for a writ of certiorari, respondent raises the following fallacious contentions:

(1) The evidence of actual confusion was not improperly excluded, since there was no adequate foundation for the testimony of public consumers, and since the trial court repeatedly explained why the evidence was refused; and,

(2) The granting of the petition for a writ of certiorari would be no more than an academic exercise since, notwithstanding actual consumer confusion, the term "UP" is free for all to use, and, despite confusion, laches bars injunctive relief in trademark and unfair competition cases.

I. THE EVIDENCE OF ACTUAL CONFUSION WAS IMPROPERLY EXCLUDED.

A. There Was an Adequate Foundation for the Testimony of Public Consumers.

Respondent seeks to make it appear that the trial court's consistent rejection of the testimony of every consumer witness produced by petitioner was for the reason that "petitioner failed to establish the proper foundation for its evidence" (Resp. Br., p. 5). Respondent would have this court believe that this so-called lack of foundation "was of concern to the Trial Court" and the basis for the trial court's evidentiary rulings (Resp. Br., p. 6). The fact, however, is that such concern and basis for excluding the testimony was not once mentioned by either the trial court or respondent's counsel throughout the trial. Neither was it mentioned by the trial court in its lengthy opinion, nor by the Court of Appeals in its two paragraph *per curiam* opinion.

The trial court apparently decided at the outset of the trial that no reasonable person could purchase respondent's GET UP soft drink mistakingly believing that it was another product put out by, or in some way connected with, the makers of 7 UP. Apparently having arrived at this conclusion, the trial court rejected as "unfair, misleading and improper" and "improper and contrary to law" all evi dence to the contrary (552a). Thus, when petitioner sougth to offer the testimony of more than one-hundred witnesses who, while shopping at their regular grocery stores and super markets, had purchased respondent's soft drink mistakingly thinking that they were getting a new product put out by the makers of 7 UP, the trial court refused to allow petitioner to proceed with the examination beyond the introductory and foundation questions. In addition to

asking each witness his or her name, address and occupation, petitioner was also permitted to ask whether the witness had ever purchased GET UP, and when and where such purchases were made (Resp. Br., p. 6). After these foundation questions had been answered, petitioner, for further foundation, inquired into what the court described as the "forbidden subject" (65a), namely, "When you purchased GET UP did you have any belief as to what company put it out?" (58a.)

When the ultimate fact to be testified to is simply purchase of a soft drink under misapprehension as to its source, the only necessary foundation showing is the fact that the witness is a member of the public who made an actual store purchase of the accused soft drink and did so under a belief as to a company putting it out. Other preliminary information which may be elicited is non-essential to the proof of the ultimate fact, the state of mind of the purchaser at the time of the purchase. Typical was the attempted examination of the trial witness, Mrs. Bertha Staursky (60a):

"Q. Will you state your full name, please?
A. Bertha Staursky.
Q. Where do you live?
A. 5551 Hollywood Avenue, Maple Heights.
Q. What is your occupation?
A. Housewife.
Q. Have you ever purchased a bottle of GET UP like the one in front of you, Plaintiff's Exhibit 32?
A. Yes, I have.
Q. Approximately when?
A. Last year; and recently in April.
Q. Where, if you recall?
A. I have purchased this at Fisher Foods and also at Lawson's.
Q. Here in Cleveland?
A. Yes.

Q. When you purchased GET UP, did you have any belief as to what company put it out?

Mr. Howes: I object, your Honor.

The Court: Sustained."

Thus, there is no factual support whatsoever for respondent's subsequently conceived, present contention that the trial court properly rejected the evidence of actual purchase confusion because of a lack of foundation.

B. The Trial Court Arbitrarily, Erroneously and Repeatedly Refused to Inform Petitioner of the Grounds for Sustaining Virtually Every Objection to the Evidence Essential to Petitioner's Proofs.

At page 7 of its brief, respondent denies that the trial court refused to inform petitioner of the grounds for excluding the evidence essential to petitioner's proofs. Respondent claims that "the Trial Court again and again did state its reason for sustaining objections" and, as record references, respondent cites eleven pages of the record (30a, 192a, 249a, 250a, 251a, 253a, 254a, 299a, 326a-327a, 436a).

A reading of the first of the record references (30a) shows that the trial court arbitrarily refused to admit petitioner's Exhibit 65 (a notebook consisting of specimens of petitioner's early advertising) simply because the advertising specimens were assembled and placed in an exhibit book shortly before trial. No reason for such ruling was given by the court and, when petitioner's counsel requested to be heard, the court refused and instructed counsel to "Drop it" and go to the next exhibit.

The next record reference (192a) shows that the trial court arbitarily refused to admit deposition evidence by simply stating "I say it is improper." But petitioner could never find out why or how it was "improper."

The remaining record references cited by respondent disclose reliance by the Court upon a single, unprecedented "ground." After steadfastly refusing to disclose why it excluded exhibits and testimony offered by petitioner, the trial court suddenly commenced sustaining objections to virtually all of the critical questions propounded by petitioner's counsel by ruling "That's for cross-examination." For example, when petitioner used the words "why," "how" or "what" in trying to establish facts by the testimony of its witnesses, the trial court sustained objections as follows:

"Q. Why was that included in the questionnaire which you said you designed?

Mr. Howes: I object to that.

The Court: Sustained.

Cross-examination is for the other side.

Q. What was your purpose in including that question?

Mr. Howes: Objection.

The Court: Sustained for the same reason.

Mr. Pattishall: May I be heard, your Honor?

The Court: No.

Q. Professor Ruch, what were your reasons for designing the questionnaire in the manner in which it appears?

Mr. Howes: I object.

The Court: Sustained.

Q. Professor Ruch, did you have any reason for designing the questionnaire as you designed it?

A. I did.

Mr. Howes: I object.

The Court: Wait a minute. You got that in pretty fast, didn't you? The answer goes out. Objection sustained. You put the same question in another form. Cross-examination is for them." (249a-250a.)

"Q. In preparing the questionnaire, on what did you rely?

A. My years of—

Mr. Howes: Objection.
The Court: Sustained.
That's cross-examination again." (251a.)

"Q. Did you give them any instructions?
A. I did.
Mr. Howes: Object.
The Court: Does that mean instructions were given —are you asking what instructions were given other than the written instructions?
Mr. Pattishall: Yes, sir.
The Court: You didn't ask that.

Q. Did you give them any instructions other than the written instructions?
A. I did.

Q. What instructions did you give them?
Mr. Howes: I object.
The Court: Sustained. That's for cross-examination, sir. If he cross-examines on it, then everything he says goes in." (254a.)

Petitioner's repeated inquiries as to the basis for the court's unprecedented rulings were to no avail:

"Q. What was the purpose, if you know, of putting those numbers on the back of the sheets?
Mr. Howes: Object.
The Court: That is something the cross-examiner may ask.
Mr. Pattishall: Is the objection to the form, or is it that it is a subject of cross-examination, your Honor?
The Court: I take it that is the objection. You do all their cross-examination, and they can't do any.
Mr. Pattishall: I am simply trying to bring out the answer on what your Honor asked.
The Court: I know you're innocent about it, but don't do it. I got the point.

Q. Did you make any use of those numbers yourself?
A. Yes, sir.
Mr. Howes: Object.
Mr. Pattishall: Again, I ask that the grounds be stated on these objections.

The Court: The answer is in, so go to the next question.

Q. How did you use them?

Mr. Howes: I object to that.

The Court: Sustained.

Mr. Pattishall: Could I inquire the grounds for that, your Honor,—

The Court: There is no need—

Mr. Pattishall: —so I could cure it, if possible?

The Court: There is no need of that.

Mr. Pattishall: My difficulty is, your Honor, I have no assurance—

The Court: The difficulty is, you want to cross-examine. I have been trying to stop it, but I just can't. So I have to stop you on each question." (326a-327a.)

To the same effect is each of the remaining record references cited by respondent at page 7 of its brief to support its contention that "the Trial Court again and again did state its reasons for sustaining objections."

Respondent, at page 8 of its brief, goes even further and states, "in none of the instances cited by petitioner to show that the Court refused to explain its rulings (Pet. 8) was an actual request for such an explanation made." The record is replete, however, with examples of petitioner's desperate, futile attempts to obtain some indication or basis for the trial court's bizarre and devastating rulings and behavior. Typical of such efforts is (326a):

"Q. How did you use them?

Mr. Howes: I object to that.

The Court: Sustained.

Mr. Pattishall: Could I inquire the grounds for that, your Honor,—

The Court: There is no need—

Mr. Pattishall: —so I could cure it, if possible?

The Court: There is no need of that."

Additional examples are cited at pages 6, 8 and 9 of the petition.

II. THE GRANTING OF THE PETITION WILL RESULT IN NO "ACADEMIC EXERCISE."

A. The Word "UP" May Not Be Used as a Distinctive Part of a Trademark If It Deceives the Purchasing Public as to Source.

Respondent contends (Resp. Br. 10) that "the granting of certiorari will be no more than an academic exercise" because the District Court found and concluded, and the Court of Appeals affirmed, that "UP" is descriptive of beverages and that the use of "UP" is free and equal to all. But petitioner submits that had it not been denied a fair and impartial trial, and had its wrongly excluded evidence been received and considered, the fact that UP is not descriptive of beverages to the purchasing public would have been conclusively proven. Had the evidence of the actual purchasers who were deceived by respondent's use of GET UP been received, it would likewise have been conclusively shown that the UP portion of GET UP causes purchasers to believe that the GET UP soft drink is another product put out by the makers of the well known 7 UP.

The Court of Appeals affirmed without comment the trial court's rejection of the testimony of consumers who had been deceived and confused as to source because of their reliance upon the term UP to indicate source—not to indicate a type or flavor. No mention was made by the Court of Appeals as to whether "UP" is descriptive of soft drink beverages or whether use of "UP" is "free and equal to all" (660a). Neither did it comment upon the fact that the parties had previously stipulated to the contrary (229a):

> "Counsel have agreed that it may be stipulated as follows:
>
> '"UP" is not a generic term signifying a type of variety or flavor of soft drink.'"

The Court of Appeals was likewise silent upon the exclusion of perhaps the most telling evidence refuting the claim that the word UP is merely descriptive of an effervescent beverage, evidence which petitioner was able to include in the record only by offer of proof. The language of respondent's own GET UP franchise agreements (Plf.'s Exhs. 3-14 for *id.*; 558a) reveal that respondent is peculiarly aware of the commercial magnetism of a soft drink trademark utilizing the word UP and peculiarly aware of its particular source indicating significance, for respondent has expressly prohibited its bottlers from using any other trademark employing the word UP—or any *other* word which could be confused with GET UP (Plf.'s Exh. 8; 236a, 558a).

What the trial court held and the Court of Appeals affirmed without comment, and what respondent now contends renders "academic" the questions raised by petitioner, is that respondent and anyone else can use the word "up" as a principal part of a trademark to identify the source or origin of a soft drink. But, what these courts have held respecting "UP" would be equally true of "SEVEN," "UNITED STATES" and "STEEL" and the words contained in virtually every other trademark. Of course, respondent is free to use both "SEVEN" and "UP" in their ordinary language sense, such as in advertising that: "Our sales of all *seven* flavors in our line are going *up*." But, despite the trial court's holding after refusing to hear evidence to the contrary, and despite the silent affirmation of the Court of Appeals, it remains contrary to law for respondent to employ the word UP as a principal part of a trademark which, as the excluded purchaser evidence shows, deceives purchasers as to source. Thus, a review of the Court of Appeals' affirmance of the trial court's wholesale, arbitrary exclusion of actual purchasers' testimony of their deception caused by GET UP is indeed no "academic exercise."

B. Whether Laches and Acquiescence Bar Injunctive Relief in This Action Can Only Be Determined After a Fair and Impartial Trial.

Finally, respondent argues that the granting of certiorari in this action would be an "academic exercise" since petitioner is barred from relief by laches and acquiescence. Petitioner submits, however, that whether such equitable defenses apply in this action can only be determined after a fair and impartial trial on all issues. For example, it is well settled in trademark cases that laches and acquiescence do not bar injunctive relief if the defendant acted fraudulently or with knowledge of the plaintiff's rights. As stated in *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 419 (1916):

> "As to laches and acquiescence, it has been repeatedly held, in cases where defendants acted fraudulently or with knowledge of plaintiffs' rights, that relief by injunction would be accorded although an accounting of profits should be denied. *McLean* v. *Fleming*, 96 U. S. 245, 257; *Menendez* v. *Holt*, 128 U. S. 514, 523; *Saxlehner* v. *Eisner*, 179 U. S. 19, 39. So much must be regarded as settled."

One means by which petitioner here sought to show respondent's fraudulent intent and knowledge of petitioner's trademark rights was through the admissions in respondent's franchise agreements. As shown above, however, the agreements were arbitrarily excluded from evidence by the District Court.

This Court has also held that laches will not bar injunctive relief in trademark infringement actions where proof of infringement is clear. In *McLean* v. *Fleming*, 96 U. S. 245 (1877), this Court held, at page 253:

> "Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where

> the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

In *Menendez* v. *Holt*, 128 U. S. 514, 523 (1888), this Court reconsidered its decision respecting laches as a defense in trademark actions and reaffirmed its holding. Whether "proof of infringement is clear" in the present action depends directly on petitioner's excluded proof of actual confusion, since the unquestioned test of trademark infringement is likelihood of confusion as to source. Since petitioner was not afforded an opportunity to prove that infringement was clear, the effect of laches on this action cannot presently be determined. Similarly, it has been held repeatedly by many Courts of Appeals that laches and acquiescence do not bar injunctive relief in trademark cases if there is substantial actual confusion of the public as to source because of the public interest involved in such cases. *San Francisco Ass'n For The Blind* v. *Industrial Aid*, 152 F. 2d 532, 537 (8th Cir. 1946); *A. E. Staley Mfg. Co.* v. *Staley Milling Co.*, 253 F. 2d 269, 279 (7th Cir. 1958); *Stork Restaurant* v. *Sahati*, 166 F. 2d 348, 363 (9th Cir. 1948).

Respondent's fraudulent intent or knowledge, and the existence of public confusion as to source are, of course, issues which can only be determined after a fair trial. Petitioner, therefore, is entitled to have its inarguably admissible evidence considered. For respondent to argue that the defense of laches and acquiescence renders the petition academic begs the question by assuming that petitioner has received a fair and impartial trial on all issues bearing on laches and acquiescence.

III. CONCLUSION.

For the foregoing reasons, as well as those stated in the petition, petitioner submits that a writ of certiorari should be granted here, not only to correct the gross error committed by the District Court and sanctioned by the Court of Appeals denying petitioner a fair trial, but also, in the exercise of this Court's supervisory power, to formulate and apply proper standards for the federal courts in the conduct of trials.

Respectfully submitted,

BEVERLY W. PATTISHALL,
3500 Prudential Plaza,
Chicago, Illinois 60601,
Counsel for Petitioner.

W. THOMAS HOFSTETTER,
ROBERT M. NEWBURY,
Chicago, Illinois,

JOHN T. TABOR,
St. Louis, Missouri,
Of Counsel.